

Towards an EU Cast in the Hungarian and Polish Mold

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It is hard to appreciate the true significance of the compromise that saved the EU's budget (MFF) and its post-pandemic recovery fund (NextGenEU) from the veto of two member states that are famous for flaunting the Union's founding values.

The price of lifting the veto: adding a few conditions to the draft [regulation on budgetary conditionality](#), settled already in November 2020 between the Council and the Parliament. These additional conditions – worded in a mix of diplomatic language and legal references – were inserted in the [Council's conclusions](#). Admittedly, the legal force of these Council conclusions is questionable, even if they are likely to [trigger legal consequences](#). Despite the [animated criticism these conditions prompted](#), to a less informed, impartial observer they look rather harmless: there is a promise that the new regulation on conditionality will be applied in line with widely-accepted premises of EU law (and not for a political vendetta) and there is a confirmation of access to a standard legal challenge (annulment action before the Court of Justice) against the legal binding elements of the compromise. This does not sound revolutionary, to say the least. So why does this matter?

1. Proof that the Rule of Law is a Empty Phrase in the EU

The terms of the compromise – and especially the terms of the draft regulation – confirm that there is not much to the rule of law in the EU after all the energy that was put into defending it during the last decade.

First, in November 2020 the process for imposing budgetary conditionality was turned into a multi-step inter-institutional dialogue, i.e. the very format that Hungary and Poland learned to master over the years: They know how to use it to their political advantage, but also how to sow conflict between EU institutions while doing so. So far the only constitutional actor that has managed to stay above the fray is the Court of Justice (CJEU).

Second, the premises of withdrawing EU funds, set forth in the draft regulation have become tentative and fuzzy in the course of the trialogue. Conditionality will kick in if “breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way” (Article 3).

Recall that the budgetary conditionality is the consequence of practical difficulties with applying Article 7 TFEU. Article 7 TFEU asked for identifying the ‘clear risk of a serious breach’ of the founding value of the Union. To be able to say that a particular

behaviour (even when the facts are not disputed) ‘affects’ a subject in a ‘sufficiently direct way’ requires a series of discretionary decisions along rather unclear and imprecise terms. It is exactly the type of legal drafting that runs counter to the basic premises of the rule of law, emphasizing clarity, foreseeability and anti-arbitrariness.

It is a serious achievement on Hungary’s and Poland’s part to drive EU institutions so far into mocking the rule of law in the spirit of defending it. Then again, this is exactly what illiberal constitutional engineering is about: using familiar constitutional and legal techniques for ends that subvert constitutionalism and the rule of law.

2. Drag the CJEU Into the Mud Pit

The genius of the December compromise is that it encourages member states to drag the CJEU into the middle of this debacle. The legal terms of this enterprise have already been explored [on this blog in intricate detail](#).

It is crucial, however, to recall the practical wisdom of doing so. After all, in recent years the CJEU found both [Poland](#) and Hungary in violation of EU law for pet projects that violated the founding values. The point is not that all of a sudden Poland and Hungary trust the CJEU. Rather: they have found the perfect pretext and opportunity to engage it in a conflict where they will find allies across the EU.

This happens in a climate where courts are routinely attacked for engaging in ‘political justice’, and even the friends of judicial independence suggest packing courts (as Democrats did in the US to counter Trump appointees). The clashes (or almost clashes) European top courts have had in recent years with the CJEU (the *Weiss* saga being only recent example) create perfect opportunities for creating new alliances against juristocracy – in the name of defending democracy with a flavour of national constitutional identity. This course of action will reignite the conversation on legal pluralism – all the while pulverising the supremacy of EU law.

At a minimum, this forecast is meant to put the CJEU on notice, in case it were to rule against the member states challenging the future terms of budgetary conditionality. Such techniques of intimidation are regularly used on the national level to great success. The CJEU will only be reminded that it is not immune to the *Zeitgeist* that is suspicious of judicial supremacy.

3. Beyond Rule of Law – on to Human Rights

With the ideal of the rule of law lethally wounded (if not obliterated) and the CJEU put on notice, it is time to move to the next level.

In the past few months both Poland and Hungary turned up the volume on their public campaigns [in defense of Christian values](#) and [illiberal Christian democracy](#). These themes will gain new significance when – after the rule of law debacle – efforts to defend the founding values of the Union will concentrate on human rights, equality and non-discrimination.

Going after women's rights and [LGBT rights](#), attacking 'gender ideology' and defending the traditional family are familiar themes. The rhetorical gesture of withdrawing from the Istanbul Convention may soon be exhausted, thus, the culture wars will turn to other ways of defending women's rights, or at least their health. The [Geneva Consensus Declaration](#) on women's health and the family was cosponsored by Brazil, Egypt, Hungary, Indonesia, Uganda and the United States. This global alliance attests the wide-ranging appeal of these ideas.

At the same time, to prepare the (back)ground for recasting human rights, considerable efforts are being made to undermine the stature of the European Court of Human Rights (i.e. the body where many EU institutions look for human rights standards), sometimes in unorthodox ways. It looked odd when in the fall a former chief justice of the Hungarian Supreme Court, Zoltán Lomnici (who is now the president of the Council of Human Dignity) was [complaining in the Hungarian press](#) that his letter exposing the Soros network that has captured the workings of the ECtHR was left without a response by President Spano. This 'scandal' follows on the tails of the report that the European Center for Law and Justice conducted on Soros influence at the ECtHR ([published in French in *Valuers actuelles*](#)), followed more recently by a similar [report on the Soros-influence at the Council of Europe](#). In a familiar style, ad hominem attacks on particular judges call attention to judgments that allegedly encroach upon European and / or Christian values.

Those who point out that in more recent years the CJEU started developing its Charter jurisprudence in terms that depart from ECtHR case law (on migrants' rights, NGOs and academic freedom), shall also note that the CJEU most likely earned its special mention in the Council conclusion in part due to these judgments.

4. Hold on to the Money

While Hungary and Poland managed to successfully move attention away from their violations of the rule of law, they ultimately also succeeded in preventing the development a robust EU mechanism that would stop funding the clientelistic-oligarchic reproduction of illiberal regimes in the EU.

[Academic literature](#) has amply demonstrated how EU funding (whether in a member state or outside) strengthens the position of the executive branch, and assists dominant local parties – backing the executive – in winning re-election through regular elections. In short: EU funding becomes the fuel of illiberal regimes. According to the [literature on conditionality](#), sanctions (and conditions) have to be credible to make a difference.

Budgetary conditionality in its current form certainly does not present a credible sanction. Existing anti-fraud and anti-corruption mechanisms (even when they work) target incidental cases, and not the form of systemic corruption that the clientelistic-oligarchic reproduction of illiberal regimes presents.

With rule of law pulverized, the instinctive reaction will be to activate human rights conditionality for EU funding.

At first this looks like a promising avenue: when Polish cities declared themselves to be LGBT free zones, it triggered a withdrawal of EU funds for their [twinning projects](#) aimed to promote “opportunities for mutual understanding, intercultural learning solidarity, societal engagement and volunteering at Union level” with grants up to 25,000 EUR. Note that the [Polish Justice Minister objected](#) in the fine language of EU values, submitting that “The Union must respect the equality of all its citizens, who have the right to form their opinions and beliefs freely.” In response, the Commission confirmed on the highest level its support for the rejection of EU funding. In a [statement President von der Leyen](#) said: “Our treaties ensure that every person in Europe is free to be who they are, live where they like, love who they want, and aim as high as they want.” She added: “I will continue to push for a Union of equality.”

The concerted efforts of Poland and Hungary to push attention away from how EU money is spent and towards discussing European – and especially Christian – values is an effort to redefine the Europe where we live and love. Theirs is not an effort to settle at a cozy illiberal or [authoritarian equilibrium](#), but to redefine the terms and frames of mainstream politics in Europe – and ultimately, the shape of the Union itself. On December 10, 2020 they made considerable advances to this effect, and the consequences of their efforts should not be underestimated.

